MOTION FILED
MAR 2 3 1985

No. 84-822

In the Supreme Court of the United States

OCTOBER TERM, 1984

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, ET AL.

PETITIONERS,

v.

HAROCO, INC., ET AL.,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Motion for Leave to File a Brief and Brief of John Grado, on Behalf of Himself and Technographics, Inc., in Support of Respondents

JAMES S. DITTMAR
Counsel of Record
ALLEN C. B. HORSLEY
GENE K. LANDY
CHRISTINE M. ROACH
WIDETT, SLATER & GOLDMAN, P.C.
60 State Street,
Boston, Massachusetts 02109.
(617) 227-7200
Attorneys for Amicus Curiae John Grado, on Behalf of Himself and Technographics, Inc.

March 29, 1985

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

BEST AVAILABLE COPY

No. 84-822

In the Supreme Court of the United States

OCTOBER TERM, 1984

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, ET AL.,

PETITIONERS,

v.

HAROCO, INC., ET AL.,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Motion of John Grado on Behalf of Himself and Technographics, Inc. for Leave to File a Brief as *AMICUS CURIAE* in Support of Respondents

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

John Grado ("Grado") respectfully moves, on behalf of himself and Technographics, Inc., pursuant to Rule 36 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*.

Respondents have consented to the filing of this brief. Petitioners have refused to consent to the filing.

Interest of John Grado

Grado is President and Chief Executive Officer of Technographics, Inc. ("Technographics"), a major American manufacturer of specialty paper products with industrial facilities in seven states and three foreign countries. Grado owns approximately 30.7 percent of the shares of Technographics.

Grado is the plaintiff, on behalf of himself and Technographics, in a derivative action, *John Grado* v. *Henry Gross et al.*, filed in the United States District Court for the District of Massachusetts (Civil Action No. 84-1087-MA) ("*Grado*"). The case arises under, *inter alia*, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq. The *Grado* complaint alleges that the defendants became holders of 57.3 percent of Technographics stock by carrying out various acts of mail, wire and securities fraud, by diverting a major corporate opportunity of Technographics, by "laundering" the proceeds through a Cayman Islands "shell" corporation which they controlled, and by using those proceeds to acquire majority control of Technographics. The District Court held that the facts alleged by Grado state a claim under 18 U.S.C. §§ 1962 (a), (b), (c) and (d) on behalf of the corporation. The District Court specifically rejected the *Grado* defendants' contentions that a "racketeering injury" need be pleaded in order to state a claim under civil RICO, as well as the requirement set out by the Court of Appeals for the Second Circuit in *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, 741 F.2d 482 (2d Cir. 1984), *cert. granted*, ___ U.S. ___, 105 S.Ct. 901 (1985) ("*Sedima*") that a civil RICO plaintiff plead prior criminal convictions of defendants for RICO predicate acts.

Acting for himself, and on behalf of Technographics, Grado has an interest appropriate to qualify him as an *amicus curiae*. In the RICO cases currently before the Court, defendants are advancing arguments that would substantially curtail RICO's power to deter and to redress crime. At least one *amicus*, the American Bankers Association, has filed a brief in support of RICO defendants American National Bank and Trust Company, et al. In order to appreciate fully the implications of the proposed limitations on civil RICO, the Court should also hear and consider the viewpoint of the victims of RICO violations — victims whose rights Congress sought to vindicate with the civil RICO cause of action.

An unduly restrictive decision by the Court on the scope of civil RICO would be harmful to a large number of individual and corporate victims of RICO violations who are similarly situated to Grado and to Technographics. Grado and Technographics have suffered from precisely the sophisticated pattern of criminal activity that RICO was designed to attack. They properly may claim to represent the viewpoint of all such victims, and may appropriately advocate that civil RICO be preserved as an effective weapon against criminal acts in American interstate and foreign commerce.

Respectfully submitted,

JAMES S. DITTMAR
Counsel of Record
ALLEN C.B. HORSLEY
GENE K. LANDY
CHRISTINE M. ROACH
WIDETT, SLATER & GOLDMAN, P.C.
60 State Street,
Boston, Massachusetts 02109.
(617) 227-7200

March 29, 1985

Table of Contents.

Interest of the Amicus Curiae 1

Issues Presented 3

Summary of Argument 3

Argument 5

I. The Purported "Racketeering Injury" Requirement is but Another in a Series of Discredited Attempts to Restrict Civil RICO 5

A. The Background of "Racketeering Injury": Earlier Attempts to Restrict Civil RICO 5

B. The Purported Racketeering Injury Requirement 9

II. The Language of the Act Provides No Support for the Racketeering Injury Requirement 13

III. The Legislative History Does Not Support a Restrictive Reading of Civil RICO 15

IV. RICO is Not Overbroad in Scope 20

V. This Court Should Preserve Civil RICO as an Effective Weapon Against Crime 25

Conclusion 27

Table of Authorities Cited.

CASES.

Alexander Grant & Co. v. Tiffany Industries, 742 F.2d 408 (8th Cir. 1984) 7n, 8n, 9, 12

Bankers Trust Company v. Feldesman, 566 F.Supp. 1235 (S.D.N.Y. 1983) aff'd on other grounds sub. nom. Bankers Trust Co. v. Rhoades, 741 F.2d 511 (2d Cir.) petition for cert. filed, No. 84-657, 53 U.S.L.W. 3367 (October 24, 1984) 8n, 10, 11, 12, 15 et seq.

Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982), aff'd en banc., 710 F.2d 1361, cert. denied, U.S. , 104 S.Ct. 527 (1983) 6n, 7n, 8n

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 19n, 20n

Crocker National Bank v. Rockwell International Corp., 555 F. Supp. 47 (N.D. Calif. 1982) 18, 19

Eaby v. Richmond, 561 F. Supp. 131 (E.D. Pa. 1983) 7n

Econo-Car International, Inc. v. Agency Rent-A-Car, Inc., 589 F. Supp. 1368 (D. Mass. 1984) 19n, 20n

Eisenberg v. Gagnon, 564 F. Supp. 1347 (E.D. Pa. 1983) 6n

Furman v. Cirrito, 741 F.2d 524 (2d Cir.), petition for cert. filed, No. 84-604, 53 U.S.L.W. 3343 (October 15, 1984) 7n, 8n, 11, 19n, 20n

Hanna Mining Co. v. Norcen Energy Resources, Ltd., [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) para. 98,742 at 93,737 (N.D. Ohio 1982) 8

Haroco, Inc. v. American National Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984) cert. granted, U.S. , 105 S.Ct. 901 (1985) 7n, 8n, 10, 11, 12 et seq.

Hellenic Lines, Ltd. v . O'Hearn, 523 F. Supp. 244 (S.D.N.Y. 1981) 8, 10n, 26

In re Catanella and E.F. Hutton & Co., Inc. Securities Litigation, 583 F. Supp. 1388 (E.D. Pa. 1984) 9, 23n

In re Longhorn Securities Litigation, 573 F. Supp. 255 (W.D. Okla. 1983) 6n

Kimmel v. Peterson, 565 F. Supp. 476 (E.D. Pa. 1983) 7n, 8

Lehrman v. Gulf Oil Corp., 500 F.2d 659 (5th Cir. 1974), reh'g denied, 503 F.2d 1403, cert. denied, 420 U.S. 929 (1975) 19n

Monell v. Department of Social Services, 436 U.S. 658 (1978) 22

Moss v. Morgan Stanley, Inc., 719 F.2d 5 (2d Cir. 1983), cert. denied, 104 S.Ct. 1280 (1984) 6n

North Barrington Development, Inc. v. Fanslow, 547 F. Supp. 207 (N.D. Ill. 1980) 8n

Russello v. United States, 464 U.S. 16, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) 6n, 7, 15n, 16, 26

Schacht v. Brown, 711 F.2d 1343 (7th Cir. 1983), cert. denied, U.S. , 104 S.Ct. 508, 104 S.Ct. 509 (1984) 6n, 7n, 8n, 22

Sedima, S.P.R.L. v. Imrex Co., Inc., 741 F.2d 482 (2d Cir. 1984), cert. granted, U.S. , 105 S.Ct. 901 (1985) 7n, 8n, 9, 10, 11, 15 et seq.

Spencer Cos., Inc. v. Agency Rent-A-Car, Inc., [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) para. 98,361 at 92,214 (D. Mass. 1981) 6n

United States v. Aleman, 609 F.2d 298 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980) 6n

United States v. Campanale, 518 F.2d 352 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976) 6n

United States v. Forsythe, 560 F.2d 1127 (3d Cir. 1977) 6n

United States v. Gibson, 486 F. Supp. 1230 (S.D. Ohio 1980) 6n

United States v. Grande, 620 F.2d 1026 (4th Cir.), cert. denied, 449 U.S. 830 (1980) 6n

United States v. Morton, U.S. , 104 S.Ct. 2769, 81 L.Ed.2d 680 (1984) 15n

United States v. Turkette, 452 U.S. 576 (1981) 6, 7 9, 13, 18

United States v. Uni Oil, Inc., 646 F.2d 946 (5th Cir. 1981), cert. denied, 455 U.S. 908 (1982) 6n

STATUTES.

Racketeer Influenced and Corrupt Organizations Act, Public Law 91-452 (1970)

18 U.S.C. § 1961 2, 22
18 U.S.C. § 1962 4, 5, 13, 14, 20 et seq.
18 U.S.C. § 1964(c) 3, 4, 8, 13, 14 et seq.
84 Stat. 922, § 904(a) (1970) 13
84 Stat. 922, § 904(b) (1970) 15

7 U.S.C. § 2305(c) 14n
12 U.S.C. § 1464(q)(3) 14n
12 U.S.C. § 1975 14n
15 U.S.C. § 15 14n, 19n
15 U.S.C. § 72 14n
15 U.S.C. § 2072 14n
29 U.S.C. § 187 14n
42 U.S.C. § 1983 22
45 U.S.C. § 51 14n
45 U.S.C. § 52 14n
46 U.S.C. § 1227 14n

Congressional Record:

115 Cong. Rec. 6995 (1969) 18n
115 Cong. Rec. 9567 (1969) 20n

116 Cong. Rec. 35,204 (1970) 17
116 Cong. Rec. 35,295 (1970) 19n
116 Cong. Rec. 35,344 (1970) 17

Legislative Materials:

S. Rep. No. 91-617, 2d Sess. (1969) 26
SubComm. No. 5 of the House Comm. on the Judiciary, Hearings on S.30, and Related Proposals, Relating to the Control of Organized Crime in the United States 91st Cong., 2d Sess. 689 (1970) 16n
H. R. Rep. No. 1549, 91st Cong. 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 4007 18

Other Authorities:

Blakey, The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg, 58 Notre Dame L. Rev. 237 (1982) 6
McClellan, The Organized Crime Act or its Critics: Which Threatens Civil Liberties? 46 Notre Dame Law Rev. 55 (1970) 17
Note, Civil RICO: The Temptation and Impropriety of Judicial Restriction, 95 Harv. L. Rev. 1101 (1982) 6n, 20, 21
Note, Civil RICO Comes of Age — Proposals for Reform, 35 Rutgers L. Rev. 285 (1983) 20

No. 84-822

In the
Supreme Court of the United States

OCTOBER TERM, 1984

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, ET AL.,

PETITIONERS,

v.

HAROCO, INC., ET AL.,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Brief of John Grado, on Behalf of Himself and Technographics, Inc., in Support of Respondents

Interest of the Amicus Curiae

Grado is President and Chief Executive Officer of Technographics, Inc. ("Technographics"), a major American manufacturer of specialty paper products with industrial facilities in seven states and three foreign countries. Grado owns approximately 30.7 percent of the shares of Technographics.

Grado is the plaintiff, on behalf of himself and Technographics, in a derivative action, *John Grado* v. *Henry Gross,*

et al., filed in the United States District Court for the District of Massachusetts (Civil Action No. 84-1087-MA) ("*Grado*"). The case arises under, *inter alia*, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq. The *Grado* complaint alleges that the defendants became holders of 57.3 percent of Technographics stock by carrying out various acts of mail, wire and securities fraud, by diverting a major corporate opportunity of Technographics, by "laundering" the proceeds through a Cayman Island "shell" corporation which they controlled, and by using those proceeds to acquire majority control of Technographics.

Acting for himself, and on behalf of Technographics, Grado has an interest appropriate to qualify him as an *amicus curiae*. In the RICO cases currently before the Court, defendants are advancing arguments that would substantially curtail RICO's power to deter and to redress crime. At least one *amicus*, the American Bankers Association, has filed a brief in support of RICO defendants American National Bank and Trust Company, et al. In order to appreciate fully the implications of the proposed limitations on civil RICO, the Court should also hear and consider the viewpoint of the victims of RICO violations — victims whose rights Congress sought to vindicate with the civil RICO cause of action.

An unduly restrictive decision by the Court on the scope of civil RICO would be harmful to a large number of individual and corporate victims of RICO violations who are similarly situated to Grado and to Technographics. Grado and Technographics have suffered from precisely the sophisticated pattern of criminal activity that RICO attacks. They properly may claim to represent the viewpoint of all such victims, and may appropriately advocate that civil RICO be preserved as an effective weapon against criminal acts in American interstate and foreign commerce.

Issues Presented

I. Should the Court impose a judicially-created requirement that civil RICO plaintiffs plead a "racketeering injury", when the restriction is unsupported by the plain meaning of the words of the statute?

II. Should the Court impose a "racketeering injury" requirement upon civil RICO plaintiffs, when to do so would be in direct opposition to the intent of Congress that civil RICO deter and remediate the conduct attacked by the statute?

III. Where control over an entity is exercised and used to accomplish a pattern of racketeering activity, does such control constitute "conduct" or "participat[ion] . . . in the conduct" of an enterprise under 18 U.S.C. § 1962(c)?

IV. Where Petitioners, exercising control and direction of an enterprise, caused injury through a pattern of racketeering activity consisting of acts of mail and wire fraud, should the acts of Petitioners be immune from remedy under civil RICO?

Summary of Argument

The intent of Congress in enacting the civil provisions of RICO, 18 U.S.C. § 1964(c), was to provide a powerful new weapon against criminal conduct, and to place that weapon in the hands of private attorneys general. Neither the plain language of the statute nor the legislative history of RICO justifies the imposition of the highly restrictive limitations on civil RICO proposed by the Petitioners.

First: The proposed "racketeering injury" requirement rejected by the Seventh Circuit is an attempt to revive discredited prior efforts to limit civil RICO. Such proposed limitations improperly disregard Congress' intent that civil RICO act as

part of a broad attack on activity previously within the exclusive domain of state law. As Congress acted within its constitutional powers in creating civil RICO, the courts are without authority to restrict its application.

Second: The statutory language cannot support a "racketeering injury" requirement. Under the statute, "any person injured in his business or property by reason of a violation of § 1962" is provided a civil remedy. Use of the "by reason of" language of § 1964(c) to erect barriers to civil RICO plaintiffs misconstrues what is no more than a simple proximate cause requirement. The argument that a plaintiff's injury must flow not from the predicate acts but from the "pattern of racketeering activity" in order to be compensable distorts § 1964(c) beyond recognition. Such a proposed restriction is inconsistent with the specific statutory directive that RICO not supersede existing remedies available to a plaintiff under federal or state law, but rather afford additional remedies for injuries by violations of RICO.

Third: The legislative history does not support restrictive barriers to civil RICO actions. Underlying the statute was a congressional intent to provide a powerful new weapon against the proscribed activity. Congress was well aware that RICO would federalize claims previously reserved for the states. Congress consciously chose not to attempt to create status legislation aimed at particular groups, but rather to enact a statutory scheme directed at conduct. Congress specifically rejected the technical types of "standing" and "proximate cause" requirements developed under the antitrust laws, in favor of legislation which would preclude easy loopholes for RICO violators. Congress did, however, import into RICO from the antitrust laws the concept of private attorneys general, in order to strike at the economic roots of "organized" criminal activity. The petitioners' proposed limitation of civil RICO would contravene directly the expressed legislative intent.

Fourth: This Court may properly disregard alarmist claims that RICO is overbroad. Properly read, RICO contains sufficient "built-in" limitations to avoid offending the national interest. The requirement of 18 U.S.C. § 1962(c) that a defendant must "conduct or participate . . . in the conduct" of an enterprise through a pattern of racketeering activity limits liability of corporations to instances where the persons who exercise control or direction or make official policy are responsible for the acts complained of.

Fifth: Because Respondent alleges that both Walter E. Heller International Corporation ("Heller"), as parent of American National Bank and Trust Company of Chicago ("ANB"), and Ronald J. Grayheck, a senior officer and director of ANB, engaged in the pattern of mail and wire fraud proscribed by the statute, the facts set forth in Respondents' Complaint give rise to a civil RICO claim under § 1962(c). In order to preserve civil RICO as an effective weapon against criminal acts, the order of the Court of Appeals for the Seventh Circuit ("Seventh Circuit") should be affirmed.

Argument

I. The Purported "Racketeering Injury" Requirement Is But Another in a Series of Discredited Attempts to Restrict Civil RICO.

A. *The Background of "Racketeering Injury": Earlier Attempts to Restrict Civil RICO*

The purported "racketeering injury" requirement rejected by the Seventh Circuit below must be seen in context. It is but the latest in a series of attempts by RICO defendants to restrict

the scope of civil RICO. Among the earliest lines of attack was the claim that RICO required a demonstration that the defendants belonged to "organized crime" (later, organized crime or its "penumbra"). This restriction has been roundly and properly discredited. It is now generally acknowledged that RICO applies to all who violate its provisions.[1]

Civil defendants have also urged that literal application of the civil RICO cause of action would unreasonably federalize the common law relating to business fraud. *See generally* Blakey, *The Rico Civil Fraud Action in Context: Reflections on Bennett* v. *Berg*, 58 Notre Dame L. Rev. 237 (1982).[2] The plain answer to this argument is that set forth by the Court in its major decision on the scope of RICO, *United States* v. *Turkette*, 452 U.S. 576, 586-87 (1981) ("*Turkette*"):

[1] *Schacht* v. *Brown*, 711 F.2d 1343, 1353 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 508, 509 (1984); *Moss* v. *Morgan Stanley, Inc.*, 719 F.2d 5, 21 (2d Cir. 1983), *cert. denied*, 104 S.Ct. 1280 (1984); *Bennett* v. *Berg*, 685 F.2d 1053, 1063 (8th Cir. 1982), *aff'd en banc* 710 F.2d 1361, *cert. denied*, 104 S.Ct. 527 (1983); *United States* v. *Uni Oil, Inc.*, 646 F.2d 946, 953 (5th Cir. 1981), *cert. denied*, 455 U.S. 908 (1982); *United States* v. *Grande*, 620 F.2d 1026, 1030 (4th Cir.), *cert. denied*, 449 U.S. 830, 919 (1980); *United States* v. *Aleman*, 609 F.2d 298, 303-04, 306 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); *In re Longhorn Sec. Litig.*, 573 F. Supp. 255, 269 (W.D. Okla. 1983); *United States* v. *Forsythe*, 560 F.2d 1127, 1136 (3d Cir. 1977); *United States* v. *Campanale*, 518 F.2d 352, 363-64 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); *Eisenberg* v. *Gagnon*, 564 F. Supp. 1347, 1350-51 (E.D. Pa. 1983); *Spencer Cos., Inc.* v. *Agency Rent-A-Car, Inc.*, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) para. 98,361 at 92,214 (D. Mass. 1981); *United States* v. *Gibson*, 486 F. Supp. 1230, 1240-41 (S.D. Ohio 1980). *See* Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett* v. *Berg*, 58 Notre Dame L. Rev. 237 (1982) (hereinafter "Blakey"), at 264-65 n.78, 270 and nn.94-95, 273 and n.112, 273-74 n.113, 275-76 n.116, 279; Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 Harv. L. Rev. 1101, at 1106-09 (1982).

[2] Professor Blakey's article, which urges a liberal interpretation of civil RICO, was cited by the Court with approval in *Russello* v. *United States*, 464 U.S. 16, 104 S.Ct. 296, 78 L.Ed.2d 17, 27 (1983), as a guide to the legislative history of RICO.

> [T]he language of the statute and its legislative history indicate that Congress was well aware that it was entering a new domain of federal involvement through the enactment of [RICO]. . . . That Congress included within the definition of racketeering activities a number of state crimes strongly indicates that RICO criminalized conduct that was also criminal under state law, at least when the requisite elements of a RICO offense are present. . . . There is no argument that Congress acted beyond its power in so doing. That being the case, the courts are without authority to restrict the application of the statute.

These observations were repeated with at least equal force in *Russello* v. *United States*, 464 U.S. 16, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) ("*Russello*").[3]

Resistance to the application of the plain language of civil RICO in the context of commercial fraud cases was reduced, but not quelled, by *Turkette* and continued in the guise of a purported requirement of "competitive injury" as a prerequisite

[3] Notwithstanding the position taken by the Second Circuit in *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, 741 F.2d 482, 493-94 (2d Cir. 1984), *cert. granted*, ___ U.S. ___, 105 S.Ct. 901 (1985), the Court's interpretation in *Turkette* of Congress' intent as to the scope of RICO is properly controlling in the civil context. The statutory language for RICO criminal and civil liability is identical, and both provisions were drafted to serve the same anti-crime goals. For examples of reliance upon *Turkette* to interpret the scope of civil RICO, *see, Haroco, Inc.* v. *American National Bank & Trust Co.*, 747 F.2d 384, 390 (7th Cir. 1984), *cert. granted*, ___ U.S. ___, 105 S.Ct. 901 (1985); *Alexander Grant & Co.* v. *Tiffany Industries, Inc.*, 742 F.2d 408, 412 (8th Cir. 1984); *Furman* v. *Cirrito*, 741 F.2d 524, 527-28 (2d Cir.), *petition for cert. filed*, No. 84-604, 53 U.S.L.W. 3343 (October 15, 1984); *Schacht*, 711 F.2d at 1353; *Bennett*, 685 F.2d at 1060; *Kimmel* v. *Peterson*, 565 F. Supp. 476, 491 n.7 (E.D. Pa. 1983); *Eaby* v. *Richmond*, 561 F. Supp. 131, 134 (E.D. Pa. 1983).

to suit.[4] The majority of courts, including each Court of Appeals which has considered the issue,[5] has rejected this ill-defined limitation. In two well-reasoned decisions on this issue, United States District Court Judge Giles has pointed out the weaknesses of the "competitive injury" doctrine:

> [R]eading a competitive injury requirement into section 1964(c) would create an insurmountable practical problem . . . . As the Court in *Hanna Mining* [*Co.* v. *Norcen Energy Resources, Ltd.*, [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) para. 98,742 at 93, 737 (N.D. Ohio 1982)] noted, . . . [this requirement] . . . would leave undisturbed racketeers whose activity does not infringe on their competitor's markets. It is untenable to suggest that Congress intended such a result". [citation omitted] *Accord, Hellenic Lines, Ltd.* v. *O'Hearn*, 523 F. Supp. 244, 248 (S.D.N.Y. 1981).

Kimmel v. *Peterson*, 565 F. Supp. 476, 495 (E.D. Pa. 1983).

> The legislative history of RICO evidences an intent to escape the restrictive antitrust standing principles. Sec. 1964(c) was added to battle organized criminal activity on a new front — its pocketbook. Since a competitive injury requirement would interfere with that goal and create cracks through which targeted behavior will slip, it must be rejected.

[4] *See, e.g., Bankers Trust Company* v. *Feldesman*, 566 F. Supp. 1235, 1240-41 (S.D.N.Y. 1983), *aff'd. on other grounds sub nom. Bankers Trust Co.* v. *Rhoades*, 741 F.2d 511 (2d Cir.), *petition for cert. filed* No. 84-657, 53 U.S.L.W. 3367 (October 24, 1984); *North Barrington Development, Inc.* v. *Fanslow*, 547 F. Supp. 207, 211 (N.D. Ill. 1980).

[5] *Haroco*, 747 F.2d at 391; *Alexander Grant*, 742 F.2d at 413; *Furman*; 741 F.2d at 530-32 (2d Cir. 1984) (rejecting antitrust analogy); *Bankers Trust*, 741 F.2d at 516 n.6; *Sedima*, 741 F.2d at 496; *Schacht*, 711 F.2d at 1358; *Bennett*, 685 F.2d at 1058-59 and n.5.

In re Catanella and E.F. Hutton & Co., Inc. Securities Litigation, 583 F. Supp. 1388, 1434 (E.D.Pa. 1984).

Though the "competitive injury" requirement has now generally been abandoned, several courts have attempted to impose limitations on RICO through the so-called "racketeering injury" requirement. This theory asserts that, despite the plain language of the statute stating no such requirement, the legislative history demanding broad weapons against crime, and the strength of this Court's language in *Turkette*, RICO pleading somehow requires "something more" to state a civil claim.

B. *The Purported Racketeering Injury Requirement*

In *Alexander Grant & Co.* v. *Tiffany Industries, Inc.*, 742 F.2d 408 (8th Cir. 1984) ("*Alexander Grant*"), the Eighth Circuit noted that "a racketeering enterprise injury is a slippery concept whose definition has eluded even those courts professing to recognize it." 742 F.2d at 413. The three decisions at the Circuit Court level that have purported to adopt some variant of this "something more" requirement appear to have three very different concepts in mind.

The decision of the Court of Appeals for the Second Circuit ("Second Circuit") in *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, 741 F.2d 482 (2d Cir. 1984), *cert. granted*, ___ U.S. ___, 105 S.Ct. 901 (1985) ("*Sedima*"), referred to the "racketeering injury" requirement as a matter of "standing to sue". 741 F.2d at 494. Such standing is achieved whenever there is either infiltration of legitimate business or injury to competition. 741 F.2d at 495-96. Because the rule in *Sedima* is one of "standing," it appears that the *Sedima* panel would allow remediation under RICO for the full injury caused by the entire

criminal scheme, once standing to sue is found.[6] However, because *Sedima* attempts to exclude categories of criminal behavior from RICO, the case has been properly criticized as a revival of the "organized crime" and "competitive injury" tests under a new name. *Haroco, Inc.* v. *American National Bank & Trust Co.*, 747 F.2d 384, 394-95 (7th Cir. 1984), *cert. granted*, ___ U.S. ___, 105 S.Ct. 901 (1985) ("*Haroco*").

The Second Circuit's opinion in *Bankers Trust Co.* v. *Rhoades*, 741 F.2d 511 (2d Cir.), *cert. granted*, ___ U.S. ___, 105 S.Ct. 901 (1985) ("*Bankers Trust*"), by contrast, fashioned a "racketeering injury" requirement by means of a radical, indeed almost total, curtailment of the injury for which any civil remedy may be had under RICO. Under the *Bankers Trust* analysis, RICO provides no remedy for any damage caused by all the crimes or predicate acts which make up the RICO violation. Rather, RICO's treble damage remedy is said to apply only to "distinct" injury which is separate from and in addition to all the injury flowing from the predicate acts and is, moreover, proximately caused by the "confluence" of the pattern of crime and the use of the pattern to "invest in, control, or conduct, a RICO enterprise." 741 F.2d at 516. The Court explained its concept as follows:

> If a plaintiff's injury is that caused by the predicate acts themselves, he is injured regardless of whether or not there is a pattern; hence he cannot be said to be injured

[6] Significantly, footnote 41 of the *Sedima* opinion approves the result in *Hellenic Lines, Ltd.* v. *O'Hearn*, 523 F. Supp. 244 (S.D.N.Y. 1981), which upheld a company's claim under civil RICO to recover kickbacks it was forced to pay. There was no suggestion in that case that the company suffered separate and distinct damage from the kickbacks. The measure of damages would plainly be based on the amount of the kickbacks, which is to say the injury caused by the predicate acts.

> *by* the pattern, and the pattern cannot be said to be the but-for cause of the injury.

Id. at 517 [emphasis in original].

There are logical problems with the *Bankers Trust* analysis, illustrated by the far-fetched examples of "racketeering injury" given in the opinion itself. *Id.* As the dissent in that case points out, in each example, whether compensable injury occurs depends either upon the conduct of the victim after the crime, or upon the fortuitous conduct of a non-party — a most unusual result. 741 F.2d at 522 n.1. As the opinion in *Haroco* correctly remarks, these examples given in *Bankers Trust* do not meet even the case's own criteria for "racketeering injury". *Haroco*, 747 F.2d at 394.

Such difficulties are inherent in the *Bankers Trust* test. Only a metaphysician can find a clear distinction between damage to victims caused by a series of related crimes and damage caused by the pattern of such crimes. As Judge Pratt noted in *Furman* v. *Cirrito*, 741 F.2d 524 (2d Cir.), *petition for cert. filed*, No. 84-604, 53 U.S.L.W. 3343 (October 15, 1984), injury from a RICO violation "in most cases will flow from the predicate acts", and the effect of the *Bankers Trust* rule is therefore to "sterilize civil RICO." 741 F.2d at 529. It is surely most illogical to suggest that Congress created a treble damage action which provides no remedy for most, if not all, of the criminal conduct which Congress intended to deter.[7]

[7] A similar criticism applies to the holding in *Sedima* that civil RICO liability can occur only when the defendants have been convicted of criminal violations. That ruling has no support in the language of the statute or in the legislative history. The treble damage concept of civil RICO is in fact based on a private enforcement model derived from antitrust treble damage actions. See discussion *infra* at notes 11 and 13 and accompanying text.

In its recent decision in *Alexander Grant*, the Eighth Circuit departed from the Second Circuit to fashion a less restrictive limitation on RICO. While requiring that a civil RICO plaintiff plead "something more" than the predicate acts themselves, the Eighth Circuit found the *Bankers Trust* test to be "far narrower" than its own. 742 F.2d at 413. In holding that the plaintiff's allegations were sufficient to state a RICO claim, the Eighth Circuit appeared to enunciate a rule that whenever the pattern of criminal acitivity in violation of RICO "enable[s]" the defendants to injure the plaintiff, a civil RICO action will lie. *Id.*

The Seventh Circuit in its recent *Haroco* decision, however, rejected all of these restrictions. The Court there stated:

> Even if Congress did not anticipate all of the consequences of RICO, the breadth of the statute, including the civil provisions, was the result of deliberate policy choices on the part of Congress. In these circumstances, to impose special standing and injury requirements cannot in our view be defended as efforts to improve or polish a statute which was carelessly or inartfully drafted. RICO may be very broad, but there was nothing careless about its drafting.

747 F.2d at 398-99.

All the rules which would require a civil RICO plaintiff to plead "something more" than injury by the conduct that violates RICO are inconsistent with the plain language of RICO, and all would negate Congress' intent to attack those criminal endeavors. The *Haroco* court properly read the statute, and its order should be affirmed.

II. The Language of the Act Provides No Support for the Racketeering Injury Requirement.

As the Court noted in *Turkette*:

> In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of "a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive".

452 U.S. at 580. Any construction of the statute must begin, moreover, with its unique clause requiring explicitly that the Act be "liberally construed to effectuate its remedial purposes", Pub. L. 91-452, 84 Stat. 922, § 904(a) (1970), *reprinted in* U.S. Code Cong. & Ad. News, 91st Cong., 2d Sess. (1970).

In *Turkette*, this Court rejected the First Circuit's suggestion that RICO did not reach the predicate acts committed in the context of wholly criminal enterprises. In so deciding, this Court placed great weight on the broad language of the statute and noted pointedly:

> Had Congress not intended to reach criminal associations, it could easily have narrowed the sweep of the definition by inserting a single word, "legitimate".

452 U.S. at 581.

The same logic applies to civil RICO. Section 1964(c) sets forth the civil RICO cause of action in words which are clear and plain: any person "injured by reason of" a violation of § 1962 may sue therefor. If Congress had meant to provide a remedy only for injury "other and different" than that caused

by the conduct which violates RICO, it could, and presumably would, have said so. Had Congress intended civil RICO liability to attach only when the defendants had been convicted, again, it could easily have said so. There is no special "standing" requirement stated in the language of the statute. No such restrictions apply to RICO, because none were intended.

Those courts which have sought to impose a "racketeering injury" requirement have relied upon the language of § 1964(c) requiring that the plaintiff be injured "by reason of" a violation of § 1962. These words, it is claimed, require that all the harm done by predicate acts receive no civil remedy under RICO. Common sense dictates, however, that the words "by reason of" are meant simply to state a proximate cause requirement. There is no suggstion in the language of the Act itself, or in its legislative history, that these mundane words were meant to erect a barrier that would effectively eliminate most or all RICO civil damage claims.

In enacting § 1964(c), Congress employed conventional words common to several statutory private rights of action,[8] words which say no more than that a plaintiff's injuries must be caused by the defendants' unlawful acts. It makes no sense to

[8] Examples of federal statutes employing identical "injured by reason of" language include: The Agricultural Fair Practices Act, at 7 U.S.C. § 2305(c) (providing cause of action for coercive, anti-cooperative tactics of produce buyers); the Garn-St. Germain Depository Institutions Act of 1982, at 12 U.S.C. § 1464(q)(3) (providing cause of action for tieing arrangements by thrift institutions) and 12 U.S.C. § 1975 (providing cause of action for tieing arrangements by banks); the Clayton Act at 15 U.S.C. § 15 (providing private right of action); 15 U.S.C. § 72 (providing damage action for injury by import "dumping"); the Consumer Product Safety Act, as amended, at 15 U.S.C. § 2072 (providing cause of action for violation of product safety rules); the Griffin-Landrum Labor Reform Act, at 29 U.S.C. § 187 (providing cause of action for unfair labor practices by unions); the Employers' Liability Acts, at 45 U.S.C. §§ 51 and 52 (providing cause of action to employee); and the Merchant Marine Act of 1936, at 46 U.S.C. § 1227 (providing cause of action for discriminatory agreements between carriers).

infer that Congress meant to impose radical constraints when it used these unremarkable words in RICO.

It is a fundamental axiom that judicial interpretation of a statutory provision must harmonize with the whole statute.[9] In this regard, the Court must interpret § 1964(c) in light of the particular language of the Act which states:

> Nothing in this title shall *supersede* any provision of Federal, State or other law imposing criminal penalties or *affording civil remedies in addition to those provided for in this title*.

Pub. L. 91-452, 84 Stat. 922, § 904(b) (1970) *reprinted in* U.S. Code Cong. & Ad. News, 91st Cong., 2d Sess. (1970) [Emphasis supplied]. In taking such care not to *supersede* existing remedies, Congress unambiguously stated that RICO was intended to provide further and more powerful civil remedies "in addition to" remedies already existing for the proscribed conduct under state and federal law. The plain language of this specific legislative directive that RICO provide additional remedies for such predicate acts is clearly contrary to the *Bankers Trust* holding that any injury caused by the predicate acts must be outside civil RICO.

III. The Legislative History Does Not Support a Restrictive Reading of Civil RICO.

The statutory history demonstrates Congress' rejection of technical limitations such as the purported "racketeering injury" requirement or the prior conviction rule of *Sedima*.

[9] *United States* v. *Morton*, ___ U.S. ___, 104 S.Ct. 2769, 81 L.Ed. 2d 680, 688 (1984); *see also Russello*, 78 L.Ed. 2d at 23-24.

In *Russello* v. *United States*, the Court stated:

> The legislative history clearly demonstrates that the RICO statute was intended to provide *new weapons of unprecedented scope* for an assault upon organized crime and its economic roots. Congress' statement of findings and purpose in enacting Pub. L. 91-452, 84 Stat. 922 (1970), is set forth in its Sec. 1. This statement dramatically describes the problem presented by organized crime. Congress declared, id., at 923: "It is the purpose of this Act to seek the eradication of organized crime in the United States . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."

78 L.Ed. 2d at 26 [Emphasis supplied].

Organized crime was the prime target of RICO. However, Congress' concept of organized crime was broad and included the type of deception alleged in the present case. Congress viewed the concept of "organized criminals" as including far more than stereotypical Mafia enforcers.[10] Criminals in business suits were equally a target of the Act. *See Bankers Trust*, 741 F.2d at 521 (dissent of Cardamone, J., reviewing legislative history). Congressman Poff, a sponsor of the bill, remarked:

[10] "Organized criminals who injure business today do not look like stereotyped criminals. They are executives and technicians. Their forte is manipulation of computer information, tampering with accounting procedures, theft of trade secrets and invasion of confidential company files." *Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary, on S. 30 and Related Proposals, Relating to the Control of Organized Crime in the United States*, 91st Cong., 2d Sess. 689 (1970) ("House Committee").

> The curious objection has been raised to [RICO's provisions] that they are not somehow limited to organized crime — as if organized crime were a precise and operative legal concept, like murder, rape or robbery. Actually, of course, it is a functional concept like white-collar or street crime serving simply as a shorthand method of referring to a large and varying group of individual criminal offenses committed in diverse circumstances.

116 Cong. Rec. at 35,344 (1970).

Congress was, moreover, aware that a bill which included a definition of "organized crime" would be objectionable "status based" legislation. 116 Cong. Rec. 35,204 (1970) (remarks of Congressman Poff). Congress therefore determined to create stiff penalties and powerful civil remedies to deter the *conduct* and *practices* typically employed by organized crime. Senator McClellan, a proponent of the tough approach which Congress endorsed, remarked that "the Senate report does not claim . . . that the listed offenses are committed *primarily* by members of organized crime, only that these offenses are characteristic of organized crime." McClellan, *The Organized Crime Act or its Critics: Which Threatens Civil Liberties*? 46 Notre Dame Law Rev. 55, 142 (1970) [Emphasis in original]. "Congress determined therefore not to attack a group of persons or any single organization, but to proscribe broadly those kinds of activities which are at the root of business crime." *Bankers Trust*, 741 F.2d at 521 (dissent of Cardamone, J.). The civil RICO cause of action was intended to be a powerful weapon in the attack on such criminal conduct.[11]

[11] The section of the Act which contains the private RICO cause of action was added by Congress upon the recommendation of the American Bar Association ("ABA"). Significantly, the ABA's report argued against an earlier pro-

Congress was well aware of the inclusive nature of RICO's language. Indeed, during the Congressional debate, RICO's opponents argued that RICO was "pregnant with the potential for abuse." H.R. Rep. No. 1549, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 4007, 4081 (views of dissenting Representatives). In drawing its conclusions in *Turkette* as to the breadth of RICO, the Court cited a variety of warnings by civil libertarian opponents to RICO concerning the purported overbreadth of the Act. 452 U.S. at 586-587.[12] None of RICO's proponents argued that RICO was narrow; rather, they argued that it was necessary. As one District Court stated in *Crocker National Bank* v. *Rockwell International Corp.*, 555 F. Supp. 47 (N.D. Calif. 1982):

> [T]he key purpose of RICO's civil remedy is to "divest the association of the fruits of its ill-gotten gains." *United States* v. *Turkette*, 452 U.S. 576, 585, 101 S.Ct. 2524, 2530, 69 L.Ed.2d 246, 249 (1981). This purpose would be severely undermined if persons who suffered direct harm from racketeering activity as defined by the statute could not recover in the absence of a showing of some "special" harm . . . *Such a rule would leave money derived from the actions prohibited by RICO precisely where Congress did not intend it to remain, in the hands of RICO violators.*

posal to fashion RICO as an amendment to the Sherman Act. The report noted that such an approach would "create inappropriate and unnecessary obstacles in the way of persons injured by organized crime who might seek treble damage recovery." The Report noted pointedly that "strict" antitrust requirements on matters such as "standing" and "proximate cause" were inappropriate for RICO. 115 Cong. Rec. 6995 (1969). Of course, the ABA recommendation to separate RICO from the Sherman Act was followed.

[12] In so concluding, the Court relied particularly upon Rep. Eckhardt's warning that RICO would "'mov[e] large substantive areas formerly totally within the police power of the State into the Federal realm'". *Turkette*, 452 U.S. at 586-87.

Id. at 49-50 [Emphasis supplied]. Nowhere in the legislative history is there any statement, or even a hint, that Congress sought to impose a special standing requirement, "something more" injury rules, or a prior conviction requirement.

Congress borrowed from the antitrust laws the general concept of "private attorneys general".[13] Congress plainly intended that private parties be stimulated by the treble damage remedies and attorneys' fees provisions of civil RICO to act against criminal conduct through civil suit.[14] It would make no conceivable sense to combine such a scheme with a rule that makes the damage from the criminal acts specifically targeted by RICO immune from suit.[15] Only if civil RICO is given its intended effect will its usefulness be realized.

[13] The ABA recommended the inclusion of a private remedy "based upon the concept of § 4 of the Clayton Act [which provides] any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor. . . . [15 U.S.C. § 15]. House Committee at 538, 543-44 (1970), *quoted in Econo-Car International* v. *Agency Rent-A-Car*, 589 F.Supp. 1368, 1375 (D.Mass. 1984). In addition, Rep. Poff noted that the provision was "another example of the antitrust remedy being adopted for use against organized criminality." 116 Cong. Rec. 35,295.

[14] *Lehrman* v. *Gulf Oil Corp.*, 500 F.2d 659, 667 (5th Cir. 1974) *reh'g denied*, 503 F.2d 1403, *cert denied*, 420 U.S. 929 (1975) (articulating policy behind antitrust treble damage actions). Given the fact that prosecutorial resources are already limited, Congress rationally chose to supplement criminal RICO enforcement with private civil enforcement.

[15] The Second Circuit suggested in *Sedima*, 741 F.2d at 494-96 that a preclusive standing requirement for RICO plaintiffs is supported by an "analogous" requirement established for antitrust plaintiffs in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) ("Brunswick").

The *amicus* respectfully disputes this argument. First, as set forth incisively in *Haroco*, 747 F.2d at 391 and *Furman*, 741 F.2d at 530-32, the Court's holding in *Brunswick* rejected the request for damages caused by an *increase* in competition, because antitrust law promotes competition. RICO was intended to destroy racketeers and their enterprises. A proper analogy to *Brunswick*

IV. RICO Is Not Overbroad in Scope.

With RICO, both civil and criminal, Congress enacted a concerted, sustained offensive against criminal activity affecting interstate commerce and legitimate business and expanded the role of the federal courts in that offensive. Individual judicial expressions of concern with altering the balance of federal and state police powers are, perhaps, a euphemism for an unwarranted fear that a multitude of business fraud cases will appear on the federal docket, and that aggressive plaintiffs may wield the treble damage weapon too freely. These fears are overstated. Important limitations on RICO do in fact exist. They arise from the substantive language of § 1962, which was meant to define what is and is not a RICO violation. See generally, Note, *Civil RICO Comes of Age — Proposals for Reform*, 35 Rutgers L. Rev. 285, 327-40 (1983); Note, *Civil*

would hold that conduct that reduces crime should not violate RICO. However, *Brunswick* hardly supports a rule that "sterilizes" the civil RICO cause of action.

Secondly, it is clear from the legislative history that while Congress may have borrowed the powerful tools of the treble damage action and attorneys' fees from the antitrust laws, it explicitly did not intend to bring "the great complexity of antitrust law enforcement" into RICO. *See* 115 Cong. Rec. 9567 (1969) (quoted in *Furman* at 531). *See also Econo-Car International Inc.*, 589 F. Supp. at 1375-76.

Thirdly, antitrust law is in fact replete with examples of actions or occurrences which operate as "predicate acts" to an antitrust claim. For example, violent coercion of competitiors, bid rigging, fraud on the patent office, and other types of criminal conduct can subject the perpetrator to antitrust liability. When an antitrust plaintiff proves these acts, treble damage recovery is allowed for the entire injury caused by the course of anticompetitive conduct, including the "predicate acts".

Finally, it must be noted that RICO, for all its breadth, is a statute which defines specifically the types of activities which constitute the predicate acts. Courts must act at least as scrupulously in giving full effect to the detailed language of §§ 1961 and 1962 as they have in construing antitrust law, with its general prohibition against "combinations . . . in restraint of trade."

RICO: The Temptation and Impropriety of Judicial Restriction, 95 Harv. L. Rev. 1101 (1982).

Section 1962(a) applies only when the proceeds of crime are used to invest, or acquire an interest, in an enterprise — surely not an every-day occurrence. Section 1962(b) applies only when a criminal achieves or maintains an interest in, or control of, an enterprise by his criminal acts — that is, there must be a causal nexus between the criminal activity and the fact of maintaining interest or control. Both of these "anti-infiltration" sections are plainly of narrow applicability. The categorical rules in *Bankers Trust* and *Sedima* indiscriminately destroy the effect of even these very narrowly focused sections of RICO.

Section 1962(c) is admittedly broader, but reaches only those who actually "conduct" or "participate . . . in the conduct" of the affairs of an enterprise through a pattern of racketeering activity.[16] Claims by RICO opponents to the contrary notwithstanding, major financial institutions will not be found liable under § 1962(c), unless corporate officers with substantial control over the enterprise have caused it to participate in the business fraud involved. "[D]efendants, in raising the spectre of the opening of the litigation floodgates, overlook the fact that neither common law fraud nor securities law violates [sic] will, by themselves, be automatically eligible for redress through a civil RICO action; there is the additional requirement under sec. 1964(c) . . . that an interstate enter-

[16] In this proceeding, the Petitioners have seemingly abandoned their position, asserted below and adopted by *Sedima* and *Bankers Trust*, that the "by reason of" language of § 1964 should be used to narrow RICO. Rather Petitioners have placed primary reliance upon their construction of the words in § 1962(c): "conduct or participate . . . in the conduct of [the] enterprise". While properly protesting the propriety of raising this new argument on appeal, Respondents have also addressed these contentions. On the assumption that the Court will speak to this important issue, it is discussed here.

prise be conducted 'through' a pattern of such activity." *Schacht* v. *Brown*, 711 F.2d 1343, 1355 (7th Cir. 1983), *cert. denied* 104 S.Ct. 508, 105 S.Ct. 509 (1984).

When it is alleged that a pattern of racketeering activity has been "conducted" within the meaning of § 1962(c) by the owners, officers, employees or agents of a large institution, as is the case before this Court, two quite distinct questions arise: First, are the employees liable? And second, is the institution liable? The two questions are analytically distinct.

Plainly, under the definition of "enterprise" set out at § 1961 of the statute, the group of employees that carries out the criminal acts may itself constitute a RICO "enterprise", and the employees' conduct of such an "enterprise" may subject them to liability without regard to the role played by the institution that employs them.

The liability of the institution, however, turns on whether the acts complained of may fairly be said to be those of the institution itself, rather than simply the unauthorized acts of individual employees. One possible test would be analogous to that which the Court imposed in the area of municipal liability under 42 U.S.C. § 1983 in the case of *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978). There this Court held:

> [A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under section 1983. . . . [T]his case unquestionably involves official policy as the moving force of the . . . violation.

Id. at 694.

Likewise, where the criminal activity complained of is or has become a *de facto* custom or official policy of the institution, either by virtue of the affirmative acts of individuals who direct and control, or whose acts may fairly be said to represent, the official acts of the institution, or by virtue of the knowing acquiescence of such individuals, the institution should indeed be held accountable under RICO.[17]

The Amended Complaint of the Respondents plainly passes muster under this test. It alleges that Heller owns ANB and that Heller intentionally conducted mail and wire fraud through ANB (Amended Complaint, paras. 15-20). The allegations refer to the corporation as the actor that conducted the fraud; it is a fair inference that these acts represent the official acts and policies of Heller. A parent corporation is manifestly in a position to control and direct the acts of its subsidiary, and Heller is alleged to have conducted the affairs of ANB by a pattern of racketeering activity. It is further alleged that in so doing Heller acted together with defendant Ronald J. Grayheck ("Grayheck"), an ANB officer and director (and therefore, impliedly at least, a policymaker). Given the "notice pleading" policy of Fed. R. Civ. P. Rule 8, the Amended Complaint adequately alleges that Heller, ANB, and Grayheck violated civil RICO. Both Respondents and Petitioners will have the opportunity to test through discovery whether there is sufficient

[17] *See also Bankers Trust*, 741 F.2d at 524, where Judge Cardamone's dissent states that the "required nexus" for stating a § 1962(c) claim exists only when one is able to commit predicate acts solely by virtue of his position with the enterprise, or where the predicate acts are related to the activities of the enterprise. *See*, for example, *In re Catanella and E.F. Hutton & Co., Inc. Securities Litigation*, 583 F. Supp. 1388 (E.D. Pa. 1984), where a 1962(c) claim was properly pleaded against Hutton, where Hutton had ignored a broker's prior violations of the Securities Acts, actively promoted him as a successful broker, and named him Portfolio Manager, a member of its Director's Advisory Council, and Vice President of the Company. To the extent that *Catanella* suggests that Hutton would be liable under RICO for mere negligence, rather than affirmative misconduct, it may be wrongly decided.

evidence of the involvement of those who direct, control, or make policy at Heller and ANB to prove these allegations of RICO liability.

In contrast, the test offered by Petitioners would virtually eliminate the attack on organized criminal behavior accomplished by § 1962(c). Petitioners would require that in order to state a claim under § 1962(c), a plaintiff must allege that the pattern of racketeering activity was "an integral part of the enterprise's affairs". (Brief for Petitioners at 17). As with the purported requirement of "racketeering injury" offered by Petitioners below, the test is vague and ill-defined, and Petitioners offer no examples of their concept. Presumably Petitoners would require a RICO plaintiff to allege that the RICO violation at issue was an essential or necessary part of the enterprise. Because § 1962(c) defines both civil and criminal violations, the petitioners' proposed limitation would present a barrier for federal prosecutors to overcome as well.

The practical difficulties in applying the petitioners' proposed test are illustrated in the case at bar. Petitioners of course claim that the conduct alleged in this case would fail the "integral relationship" test. Yet setting a "prime rate" and communicating with one's customers about it is an integral part of the banking business, and violating RICO in the course of such activity would indeed be a violation within the petitioners' own test.

To read the words "conduct or participate . . . in the conduct" to mean "participate as an integral part of the enterprise's affairs" is only, once again, to seek to graft onto RICO concepts and meanings which nowhere appear in the statute. These qualifying words are not included in the statute for good reason — Congress fully intended to cast the RICO net over criminal conduct in any and all enterprises operated through a pattern of racketeering activity. No immunity has been granted to first-time offenders. There is no reason to believe that Congress

intended to allow a claim of "good behavior most of the time" to be a defense in a case of intentional criminal activity that has damaged a RICO plaintiff.

This class of potential institutional RICO violators is admittedly broader than the class of institutions for whom racketeering is the main business of the enterprise. But Petitioners have failed to point out any policy or practical reason why otherwise legitimate enterprises that stoop to commit a pattern of racketeering activity should be immune from civil RICO.

The test proposed by Petitioners would in fact greatly weaken RICO as an instrument against organized crime. Sophisticated criminals who operate enterprises with crime as a dominant part of their business will surely take great pains to hide the fact. Under the petitioners' proposal, violators who hide most of their crimes would be protected from RICO claims or prosecution for those crimes which are discovered. The proposed "integral relationship" test is not supported by the language of the statute, by the legislative history, or by good sense. It should not be adopted.

In contrast, the "official act" test proposed by the *amicus* herein adequately strikes a balance between the need to stop organized criminal behavior and the need to impose RICO liability only on those corporatons which can fairly be deemed responsible for RICO violations. Under that test, the decision of the Court of Appeals for the Seventh Circuit should be affirmed.

V. This Court Should Preserve Civil RICO as an Effective Weapon Against Crime.

RICO case law to date has produced numerous examples of egregious criminal behavior of the type that civil RICO was indubitably designed to combat. Examples familiar to the Court are the facts of *Sedima* and *Bankers Trust*, and the kick-

back scheme properly held to violate RICO in *Hellenic Lines, Ltd.* v. *O'Hearn*, 523 F. Supp. 244 (S.D.N.Y. 1981). A further example is the *Grado* case described above. In such cases, there is a plain and manifest national interest to be served by civil RICO in helping to free American interstate and foreign commerce from criminal conduct. In *Russello* the Court relied upon the following legislative history:

> What is needed here . . . are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, *and the attack must take place on all available fronts*.

78 L.Ed.2d at 26 (quoting S.Rep.No. 91-617 at 79 (1969)) (Emphasis supplied). Civil RICO must, at the very least, be preserved in a manner which deters and remediates these egregious violations of law.

The facts of the instant case, while perhaps less suggestive of stereotypical "racketeering", are no less within the plain language of the statute and unambiguously constitute an intentional pattern of fraudulent and criminal acts which caused extensive economic harm. It follows that the Respondents' Amended Complaint pleads a civil RICO claim, that the decision of the Court of Appeals for the Seventh Circuit was correct on the merits, and that it should be affirmed.

It would, therefore, be inappropriate for the Court to curb civil RICO. The Court should reject attempts to break the sword that Congress forged.

Conclusion.

For the foregoing reasons, the order of the Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

JAMES S. DITTMAR
Counsel of Record
ALLEN C. B. HORSLEY
GENE K. LANDY
CHRISTINE M. ROACH
WIDETT, SLATER & GOLDMAN, P.C.
60 State Street,
Boston, Massachusetts 02109.
(617) 227-7200

March 29, 1985